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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6015

ORIGINAL COPY

MARVIN RAY ROBERTSON,
Appellant

V.

THE STATE OF TEXAS,
Appellee

ON APPEAL FROM THE
TEXAS COURT OF CRIMINAL APPEALS

MOTION TO DISMISS OR AFFIRM

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas, Appellee herein, by and through its attorney, the Attorney General of Texas, and moves to dismiss or affirm the decision of the Texas Court of Criminal Appeals on the ground that the question presented is so insubstantial as to not require further argument.

OPINION BELOW

The unpublished opinion of the Texas Court of Criminal Appeals affirming the judgment of conviction, is reported in Marvin Ray Robertson v. State of Texas, 586 S.W.2d 877 (Tex.Crim.App. 1979), and the opinion is reproduced in the appendix to Appellant's Statement of Jurisdiction.

JURISDICTION

Appellant seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(2).

QUESTION PRESENTED

I. WHETHER ROBERTSON'S SENTENCE OF LIFE IMPRISONMENT FOR BEING AN HABITUAL CRIMINAL VIOLATES THE DUE PROCESS CLAUSE UNDER THE FOURTEENTH AMENDMENT OR IS CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in part:

> No state shall...deprive any person of life, liberty, or property, without due process of law...

Texas Penal Code, article 1.02 provides:

> The general purposes of this code are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate. To this end, the provisions of this code are intended, and shall be construed, to achieve the following objectives:
>
> (1) to insure the public safety through:
>
> (A) the deterrent influence of the penalties hereinafter provided;
>
> (B) the rehabilitation of those convicted of violations of this code; and
>
> (C) such punishment as may be necessary to prevent likely reoccurance of criminal behavior;
>
> (2) by definition and grading of offenses to give fair warning of what is prohibited and of the consequences of violation;
>
> (3) to prescribe penalties that are proportionate to the seriousness of the offenses and that permit recognition of differences in rehabilitation possibilities among individual offenders;
>
> (4) to safequard conduct that is without guilt from condemnation as criminal;
>
> (5) to guide and limit the exercise of official discretion in law enforcement to prevent arbitrary or oppressive treatment of persons accused or convicted of offenses; and

(6) to define the scope of state interest in law enforcement against specific offenses and to systematize the exercise of state criminal jurisdiction.

Texas Penal Code, Article 12.42(d) provides:

> If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life.

STATEMENT OF THE CASE

The textual portion of Appellant's Statement of the Case (Jurisdictional Statement of Appellant at 2-3) is adequate, except that he fails to note the nature of the prior felony convictions used for enhancement. The jury found that Appellant had been convicted for the offense of burglary on January 14, 1972, in Dallas County, Texas, in Cause No. C-72-60-JH, and he was sentenced to serve three years at the Texas Department of Corrections. Further, the jury found that Appellant had been convicted of burglary of a building on October 15, 1974, in Dallas County, Texas, in Cause No. C-74-6670-IH, and he was sentenced to serve three years in the State penitentiary. Also, at the punishment stage of Robertson's bifurcated trial, no objection was made that the imposition of a life sentence constituted cruel and unusual punishment. Instead, at the pretrial stage, Robertson filed a Motion to Strike Unconstitutional Enhancement Paragraphs and the grounds for this motion were never reurged during the trial. Further, the only objection urged by Appellant concerning the court's charge on punishment was that it should include the issue of insanity.

ARGUMENT AND AUTHORITIES

THE TEXAS COURT OF CRIMINAL APPEALS CORRECTLY AFFIRMED ROBERTSON'S LIFE IMPRISONMENT SENTENCE FOR BEING A HABITUAL CRIMINAL BECAUSE ARTICLE 12.42(d) OF THE TEXAS PENAL CODE IS CONSTITUTIONAL.

A. Motion to Affirm

Appellant contends that the Texas Criminal Procedure for sentencing defendants who have been indicted with two prior convictions alleged for enhancement violates the due process clause and therefore constitutes cruel and unusual punishment because it does not allow individualized sentencing for consideration of mitigating circumstances. The specific statute in question, Article 12.42(d) of the Texas Penal Code, provides that once the defendant is found guilty of the primary offense and before he can be sentenced under the provision, "The State must prove that each succeeding conviction was subsequent to both the commission and conviction for the preceding offense." Rummel v. Estelle, 587 F.2d 651, 656 (5th Cir. 1978), aff'd ___U.S.___, 48 U.S.L.W. 4261, No. 78-6386 (U.S. March 18, 1980). This Court clearly held in Spencer v. Texas, 385 U.S. 554 (1967), that the Texas Habitual Criminal Statute then applicable, Texas Penal Code Ann., article 63 (Vernon's 1925), was constitutional.[1] Article 63 is currently codified in article 12.42(d) of the Texas Penal Code Ann. In Spencer, this Court noted that:

> ..No claim is made here that the recidivist statutes are themselves unconstitutional, nor could there be under our cases. Such statutes and other enhanced-sentence laws, and procedures designed to implement their underlying policies, have been enacted in all the States, and by the Federal Government as well.... Such statutes, though not in the precise procedural circumstances here involved, have been sustained in this Court on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities. Moore v. State of Missouri, 159 U.S. 673, 16 S.Ct. 179, 40 L.Ed. 301; McDonald v. Commonwealth of Massachusetts, 180 U.S. 311, 21 S.Ct. 389, 45 L.Ed. 542; Graham v. State of West Virginia, 224 U.S. 616, 32 S.Ct. 583, 56 L.Ed 917; Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed 1683; Oyler v. Boles, 386 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446. (Emphasis added.) Id. at 559-60.

1/ Texas Penal Code, article 63 (Vernon's 1925) provides:

> Whoever shall have three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

Inherent in this Court's finding is the proposition that the Texas Habitual Statute, by providing for a mandatory life sentence without consideration of mitigating factors, violates neither the due process clause nor the cruel and unusual punishment amendment.

In Graham v. State of West Virginia, supra, the Court rejected an Eighth and Fourteenth Amendment challenge to a sentence of life imprisonment imposed by a court after the jury found the accused guilty and returned a verdict identifying Graham as the person previously convicted of other crimes. Earlier, in McDonald v. Commonwealth of Massachusetts, supra, the Court upheld the imposition of a heavier penalty by the trial court after the jury had found the accused guilty of a felony and found the indictment alleging two prior felonies to be true, since the Court found that a Massachusetts Habitual Criminal Statute did not violate the constitutional provision against cruel and unusual punishment. Although the Court has never explicitly stated in these cases that the habitual statutes do not require the trial court to consider mitigating factors in assessing punishment, this notion would be totally contrary to the purpose and the language of such statutes.

Recently, this Court upheld the conviction and sentence of one who had been convicted of a felony and sentenced under the Texas Habitual Statute. Rummel v. Estelle, ___U.S.___, 48 U.S.L.W. 4261, No. 78-6386 (U.S. March 18, 1980). The crimes committed by Rummel were not violent acts, but constituted unlawful acquisitions of others' property. This Court held:

> ...[T]he interest of the State of Texas here is not simply that of making criminal the unlawful acquisition of another person's property; it is in addition the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law. Id., 48 U.S.L.W. at 4264.

Thus, it is clear that this Court recognizes that the State of Texas has legitimate interest in providing for a mandatory life sentence without consideration of other factors when dealing with an habitual criminal.

Appellant's reliance on Lockett v. Ohio, 438 U.S. 586 (1958), Jurek v. Texas, 428 U.S. 262 (1978), Gardner v. Florida, 430 U.S. 349 (1977), Pennsylvania v. Ash, 58 U.S. 51 (1937), and Texas Penal Code article 1.01(3) for support of his contention that the Eighth and Fourteenth Amendment require individualized sentencing is completely misplaced. Appellant is correct in stating that individualized sentencing is a creature of state statutes, but he is not correct in asserting that it should be mandated by the United States Constitution. This Court recognizes "that any 'nationwide trend' toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts." Rummel v. Estelle 48 U.S.L.W. at 4266. Without doubt, it is a legislative function to decide how a person accused of a crime will be sentenced. A state's criminal procedure as it relates to sentencing, "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). "The States have always been given wide leeway in dividing responsibility between judge and jury in criminal cases." Spencer v. State of Texas, U.S. at 560.

Most of the cases cited by Appellant dealt with crimes involving the death penalty. Capital cases occupy a unique place in Eighth Amendment jurisprudence because of the awesome and irrevocable nature of the punishment. See, e.g., Coker v. Georgia, 433 U.S. 584, 598 (1977); Furman v. Georgia, 408 U.S. 238, 290 (1972). Thus, it is quite proper to require individual consideration of mitigating factors in capital cases. However, the considerations found in capital

cases do not come into play in non-capital cases such as this one, since these matters are left to the state legislatures.

Furthermore, Appellant's argument that article 1.03(3) of the Texas Penal Code shows that the State of Texas has a public policy which mandates individualized sentences is ill-founded. The statute, read as a whole, is clearly consistent with article 12.42(d). For example, part of the statute reads " the provisions of this code are intended, and shall be construed, to achieve the following objectives: ...to insure the public safety through...such punishment as may be necessary to prevent likely reoccurance of criminal behaviour...."[2] It is futile to contend that the Texas Legislature intended article 1.02(3) of the Texas Penal Code to be construed to require individualized sentencing in all criminal cases when they enacted article 12.42(d) in the Texas Penal Code.

Appellant does not contend that the imposition of his life sentence was grossly disproportionate to the severity of his crimes. Instead, he only claims that the procedure followed by Texas courts under the Texas Penal Code, article 12.42(d), results in cruel and unusual punishment. This Court stated in Rummel that Texas is entitled to make its own judgment as to where to draw the line in sentencing, "subject only to those strictures of the Eighth Amendment that can be formed by objective factors." Rummel v. Estelle 48 U.S.L.W. at 4266. The question thus becomes what violates the Eighth Amendment.

Prior to this decision, the Court has interpreted the provisions of the Eighth Amendment to bar only punishment that is "barbaric" and "excessive" in relation to the crime committed. Coker v. Georgia, 433 U.S. at 592. In determining whether a punishment is "excessive" and unconstitutional under the Eighth Amendment, this Court has provided the following guidelines: the punishment is unconstitutional if

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2/ See, Texas Penal Code, article 1.02 on page 3.

it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime", then the "punishment must fail the test on either ground." Id. 433 U.S. at 592. To determine whether the punishment passes or fails, objective factors such as the history and precedent of the particular sentence and legislative attitudes must be considered. Id. 433 U.S. at 592. In view of this, it is clear that a life imprisonment sentence under the Texas Habitual Statute is constitutional. See, Rummel v. Estelle, 48 U.S.L.W. at 4262. Appellant's arguments therefore must fail for any one or all the reasons set forth above.

B. Motion to Dismiss

Appellant admits that individualized sentencing is created by state statute and not by a provision in the United States Constitution. (See, p. 5 in Appellant's Jurisdictional Statement). Therefore, this appeal should be dismissed for want of a substantial federal question.

CONCLUSION

For the reasons above stated, Appellant has failed to raise any substantial question indicating that a review of his contentions are needed, and, therefore, his conviction should be affirmed on the record as it stands and the appeal should be dismissed for want of a substantial federal question.

Respectfully submitted,

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PROOF OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, and a member of the Bar of this Court, hereby certify that three copies of the above Motion to Dismiss or Affirm have been served by placing same in the United States Mail, postage prepaid, certified, on this the 3rd day of April, 1980, addressed to: Barry J. Brooks, 2340 Fidelity Union Tower, Dallas, Texas 75201.

GILBERT J. PENA
Assistant Attorney General